Supreme Court, U.S.
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No. 05- 05-774

IN THE

Supreme Court of the United States

NATIONAL ENTERPRISES, INC.
and ARKANSAS NO. 1 LLC,

Petitioners,

v.

DONALD D. KESSLER and MARY L. KESSLER, *et al.*
on their own behalf and on behalf of
others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does it violate the Due Process Clause of the Fourteenth Amendment for a court to certify a class and determine the merits of class claims before it provides absent plaintiff class members notice and an opportunity to opt out?

2. Can a defendant in a Rule 23(b)(3) class action ever waive the rights of absent plaintiff class members under the Due Process Clause of the Fourteenth Amendment to notice and an opportunity to opt out?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner National Enterprises, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock. Arkansas No. 1 LLC is the wholly owned subsidiary of National Enterprises, Inc.

Respondents Donald D. Kessler and Mary L. Kessler are individuals and representatives of the class at issue.

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The opinion of the Arkansas Supreme Court (Pet. App. 1a), to be published in S.W.3d, is currently available at 2005 WL 2237787 (Ark. 2005).

STATEMENT OF JURISDICTION

The judgment of the Arkansas Supreme Court was entered on July 1, 2005. A substituted opinion on denial of rehearing was entered on September 15, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Background. In 1983, a real estate developer financed and built a hotel and condominium project on a lake in Hot Springs, Arkansas. In 1985, the condominium project was sold to a partnership, and the developer and the partnership signed a license agreement for the condominiums to use the hotel's parking lot, utilities and recreational facilities. Pet. App. 3a. The partnership created a timeshare regime and marketed timeshare intervals, but sales did not meet expectations, and the partnership conveyed the unsold timeshare units to Hanson, Hooper & Hayes ("HHH") in August 1986. Pet. App. 3a. HHH pledged the unsold

timeshare intervals to Independence Federal Bank to secure a loan. Pet. App. 3a. That bank failed and was placed under the control of the Resolution Trust Corporation ("RTC") as receiver. Pet. App. 3a. The RTC sued to foreclose the HHH mortgage and, while that action was pending in October 1993, sold the HHH note and security interest in the timeshare intervals at a public auction to petitioner National Enterprises, Inc. ("NEI"). Pet. App. 4a. Meanwhile, in 1990 the hotel property had been purchased at a separate foreclosure and was acquired by Lake Hamilton Resort, Inc. ("LHR"). Pet. App. 3a.

After NEI bought the note and mortgage, LHR approached NEI to buy the unsold timeshare intervals. Pet. App. 4a. The negotiations were unsuccessful, and LHR told all timeshare owners that the hotel would not honor the license agreement after December 1993. Pet. App. 4a. NEI completed the foreclosure on unsold timeshare intervals in May 1994. Pet. App. 4a. Within a month, NEI sued LHR to enforce the license. In that case, the Circuit Court for Garland County, Arkansas ruled that the license was personal to the original developer and did not run with the land for the benefit of any timeshare owners, including NEI as the owner of the unsold intervals. Pet. App. 4a.

The Litigation. One of the timeshare owners sued NEI[1] for rescission and damages on the theory that NEI was a successor to the original developer and, under an Arkansas statute, had the developer's obligation to provide parking,

1. On September 18, 1995, NEI conveyed all of its interests in the timeshare intervals to a wholly-owned entity, Arkansas No. 1 LLC. NEI and its LLC have continued to be the only parties in the litigation that followed. Following a convention used by the Arkansas Supreme Court, Pet. App. 5a, NEI and Arkansas No. 1 LLC are referred to collectively as "NEI."

utilities, and recreational facilities for timeshare owners. The timeshare owner prevailed in that lawsuit in the Garland County Circuit Court. Pet. App. 42a. The appeal of that case was not perfected and therefore was dismissed.

Other timeshare owners then filed this case in the same court on behalf of a class that allegedly included 300 timeshare owners for damages due to NEI's failure to provide parking, utilities and amenities as successor to the original developer. Pet. App. 5a. The case was removed to federal district court by prior counsel for NEI on the basis of diversity of citizenship. *Kessler v. National Enterprises, Inc.*, 347 F.3d 1076, 1078 (8th Cir. 2003). The district court certified a class of all timeshare owners other than NEI, and in 1997 class counsel provided notice by mail to each absent class member. Pet. App. 51a. Each class member was given the opportunity to opt out of the federal action. None did. Pet. App. 52a.

After that class notice, the district court dismissed the case under the *D'Oenche, Duhme* doctrine. The Eighth Circuit Court of Appeals reversed at 165 F.3d 596 (1999). On remand, the district court determined the merits against the plaintiff class. The Eighth Circuit Court of Appeals reversed that judgment and also determined liability in favor of the class and against NEI. Pet. App. 41a. The appellate court remanded to the district court for "calculation of damages." Pet. App. 42a. On remand, the district court entered a judgment against NEI based on disputed documentary evidence of class damages. NEI appealed the judgment in favor of the class and, on that appeal, argued among other things that the federal courts lacked diversity jurisdiction because the amount in controversy for each class member was not sufficient to establish federal jurisdiction.

347 F.3d at 1078. The Eighth Circuit agreed and remanded the case to the district court with instructions to remand to the Garland County Circuit Court. *Id.* at 1081.

On remand to the state court, on December 15, 2003, NEI filed a motion to dismiss under ARK. R. CIV. P. 12(b)(6) against the named plaintiffs. That motion presented matters outside the pleadings and was therefore converted to a motion for summary judgment.[2] In January 2004, the named plaintiffs filed a counter-motion for summary judgment and a motion for class certification, urging the state court to (1) certify a class, (2) enter judgment in favor of that class, and then (3) provide notice of the action to absent class members after "the judgment becomes final and non-appealable." Pet. App. 74a.

NEI objected to this process, pointing out that the court could not determine the merits of the case as a class action before providing notice of the action to absent class members. Pet. App. 67a-70a. At the hearing on these motions on April 19, 2004, NEI argued that absent class members must receive notice before the merits were decided "because some of these absent class members may want to bring their own attorney. They may not think that [class counsel's] numbers are the right numbers. They may think they want to get more." Pet. App. 79a.

The Trial Court Ruling. Nevertheless, on May 14, 2004, the Garland County Circuit Court entered an order certifying the case as a class action and, at the same time,

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2. Arkansas Rules of Civil Procedure 12 (b)(6) and 56 are identical to FED. R. CIV. P. 12(b)(6) and 56 on the issue of converting a 12(b)(6) motion to a summary judgment motion.